In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-584

PETER J. MARTINO AND WARREN LUKE MARTINO, A/K/A "WIMPY" MARTINO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioners Peter J. Martino and Warren Luke Martino were convicted of two counts of having used interstate telegraph facilities to promote gambling activities in violation of 18 U.S.C. 1952 and 2 (Counts II and III) and of one count of having conspired to use the wire facilities in violation of 18 U.S.C. 371 (Count I). Petitioner Peter J. Martino was sentenced to two years' imprisonment on Counts I and II, to run consecutively. Petitioner Warren Martino was sentenced to eighteen months' imprisonment on Counts I and II,

to run consecutively. Additionally, each received a suspended sentence and five years' probation on Count III. The court of appeals affirmed (Pet. App. 1-3) and subsequently denied a petition for rehearing *en banc* (Pet. App. 5).

The evidence adduced at trial showed that the 406 Club, located in Biloxi, Mississippi, was operated by petitioners as a bookmaking and gambling operation from July 1962 to March 1966 (Tr. 30-48, 53-56, 81-82, 204-205).[1] The activities conducted in the club included card games and wagering on horse races and other sporting events (Tr. 56-58). During this time and continuing until January 1970, a Western Union telegraph machine was installed on the premises. The machine, commonly called a "sports ticker," relayed sporting results from Chicago, Illinois, to the club (Tr. 30-48). Sports scores received on the telegraph tape were posted on a board and the tape itself was used at the betting window for determining winners (Tr. 104, 118, 145-151, 182-188, 197-198, 211-212, 255).

In the operation of the business, petitioner Peter Martino arranged for the printing of football and baseball parlay sheets (Tr. 294-308), and Warren Martino paid the monthly rent (Tr. 88-90). Additionally, at various times, Warren Martino took bets and made payments to the winners (Tr. 69, 94, 102-104, 125, 188). At one time, he also communicated with Western Union concerning a breakdown in the equipment (Tr. 35).[2]

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[1] "Tr." refers to the transcript of the trial proceedings, a copy of which we are lodging with the Clerk of this Court.

[2] It was also shown that when Peter Martino was arrested, he stated in the presence of his attorney, "I'll sue them, I hope I am

Petitioners now claim that they were denied due process and the right to a fair trial because the verdict form submitted to the jury did not state that the jury was to consider each petitioner separately in determining guilt or innocence on each of the three counts. They also contend that the district court's instructions similarly precluded the jury from making a separate finding of guilt or innocence for each petitioner.[8] The record discloses that petitioners expressed their satisfaction with the instructions to the jury and raised no objection to the verdict forms (Tr. 380-381). Moreover, the contentions raised here were presented to the court below for the first time on a petition for rehearing. Under these circumstances, consideration

convicted, I'll sue Western Union for selling me something illegal." (Tr. 204-205).

[8] The district court charged (Tr. 378-379):

> Now a form of verdict has been prepared for your convenience and use in this case. It is not complicated, but I will make some brief explanation of it to you. You understand you have got three counts. You will decide as to the guilt or innocence of these defendants on these three counts, so let's talk about count one. You have got to consider them separately anyway. If your determination, if all twelve of you say that these defendants are not guilty of the offense charged in count one the form of your verdict as written out on this verdict as it will be "We, the Jury, find the defendants to be not guilty on count one of the indictment", in which event you would put your X mark in the rectangle opposite that form of verdict as to count one. On the other hand, if your unanimous determination is that these defendants are guilty on count one the form of your verdict would be "We, the Jury, find the defendants to be guilty as charged of the offense stated in count one of the indictment", in which event it would be necessary for you to put your X mark in the rectangle opposite that form of verdict, and so likewise with respect to count two and count three of this indictment.

of the issue by this Court is unwarranted. Cf. *Lawn* v. *United States,* 355 U.S. 339, 362-363, n. 16; *Adickes* v. *Kress and Co.,* 398 U.S. 144, 147, n. 2. In any event, the evidence produced at that trial clearly established petitioners' guilt as joint participants in the illegal gambling venture, and the jury convicted each of them not only of substantive counts but also of conspiracy. Since the jury was wholly justified in returning a guilty verdict as to each petitioner on each count, the nature of the verdict forms did not prejudice petitioners.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

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